86-775

No. ———

Supreme Court, U.S.
FILED
NOV 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARSH MEDIA, LTD.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERT W. REIN *
JOHN C. QUALE
JAMES R. BAYES
DIANE Z. GOLDMAN
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Petitioner Marsh Media, Ltd.
* Counsel of Record

November 13, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 613(a) of the Cable Communications Policy Act of 1984—codifying a pre-existing rule of the Federal Communications Commission ("FCC")—bars any person holding an interest in a television broadcast station license from acquiring or holding any interest in a cable television system which operates within the station's service area. Marsh Media, Ltd. ("Marsh"), whose principals are the licensees of a television broadcast station in Amarillo, Texas and four other television stations in Texas, New Mexico and Oklahoma, is subject to an FCC order to divest part of its interest in an Amarillo cable system. In proceedings before the FCC and the Fifth Circuit, Marsh raised a constitutional challenge to the cable divestiture requirement and to the future cable acquisition bar of Section 613(a). The Fifth Circuit, echoing the FCC, held that the power to allocate scarce broadcast frequencies to achieve content diversification as recognized in this Court's decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), required summary rejection of Marsh's constitutional contentions.[1]

The important constitutional issue presented is:

Whether the foreclosure of cable and broadcast speech rights under Section 613(a) and the FCC's predecessor regulation can be justified under the First Amendment by the alleged desirability of government action to diversify the content of the broadcast media?

a. Whether diversification of broadcast content through ownership restriction remains a constitutionally legitimate government regulatory objective under current con-

---

[1] The parties to this proceeding include Marsh, the FCC, the United States of America, and intervenors Telecommunications Research and Action Center and Western Communications, Inc. In addition, the Freedom of Expression Foundation filed a brief as Amicus Curiae supporting Marsh before the Fifth Circuit.

ditions of spectrum availability and electronic media access?

b. Whether, assuming that such diversification remains a permissible regulatory objective, a discriminatory broadcast/cable cross-ownership prohibition intended to foster such diversification may be imposed when the administrative and legislative record fails to demonstrate any nexus between such a blanket prohibition and the content diversification objective?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Adoption of the Cross-Ownership Restriction	3
B. Marsh's Challenge to the Cross-Ownership Rule at the Commission	6
C. Proceedings Before the Fifth Circuit	8
REASONS FOR GRANTING THE WRIT	9
I. THE FORECLOSURE OF CABLE AND BROADCAST SPEECH RIGHTS ON THE BASIS OF A SPECULATIVE, PHYSICAL SCARCITY-BASED GOVERNMENT INTEREST IN DIVERSIFICATION OF BROADCAST MEDIA CONTENT NECESSITATES REVIEW BY THIS COURT: (A) TO REEXAMINE THE OUTDATED PHYSICAL SCARCITY RATIONALE FOR AFFIRMATIVE GOVERNMENT INTRUSION INTO ELECTRONIC SPEECH; AND (B) TO REAFFIRM THE NEED FOR ADEQUATE RECORD SUPPORT OF ANY CONSTITUTIONALLY LEGITIMATE LIMITATION OF FIRST AMENDMENT RIGHTS IN THE ELECTRONIC MEDIA	9
A. The Fifty-Year-Old Spectrum Scarcity Rationale for Content-Directed Restraints on the Broadcast Media Should Be Reexamined by This Court in Light of Recent and Rapid Changes in Spectrum Availability and Electronic Media Access	11

TABLE OF CONTENTS—Continued

Page

B. The "Rational Basis" Test Which Permitted the Lower Court to Sustain the Broadcast/Cable Cross-Ownership Prohibition Without Any Record Showing of Its Nexus to Diversification of Broadcast Speech Should Be Reexamined to Conform Review of Restraints on the Broadcast and Related Media to This Court's Nonbroadcasting Speech Decisions 17

ONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Bolling v. Sharpe, 347 U.S. 497 (1954) 22
Buckley v. Valeo, 424 U.S. 1 (1976) 10
Chicago Police Department v. Mosley, 408 U.S. 92 (1972) 23
City of Los Angeles v. Preferred Communications, Inc., —— U.S. ——, 106 S.Ct. 2034 (1986) ....*passim*
Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) 23
Cox v. Louisiana, 379 U.S. 536 (1965) 24
Cox v. New Hampshire, 312 U.S. 569 (1971) 13
FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 12, 15
FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 5, 22
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) .....*passim*
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933) 12
Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) 5
Johnson v. Robison, 415 U.S. 361 (1974) 22
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 18
Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 23
Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18
Meredith Corp. v. FCC, D.C. Cir. No. 85-1723.... 16
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 10, 16
NAACP v. Button, 371 U.S. 415 (1963) 23
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 13
Niemotko v. Maryland, 340 U.S. 268 (1951) 23, 24
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 2889 (1986) 6, 21
Radio T.V. News Directors Assn. v. FCC, D.C. Cir. No. 85-1691 16

TABLE OF AUTHORITIES—Continued

Page

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*
Reed v. Reed, 404 U.S. 71 (1971) 24
Richardson v. Belcher, 404 U.S. 78 (1971) 22
Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 24
Shapiro v. Thompson, 394 U.S. 618 (1969) 22
Shurberg Broadcasting of Hartford, Inc. v. FCC, D.C. Cir. No. 84-1600 16
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 22
Steele v. FCC, D.C. Cir. No. 84-1176 16
Telecommunications Research and Action Center and Media Access Project v. FCC, No. 85-1160 (D.C. Cir. Sept. 19, 1986), *pet. for reh'g pending* 13-14, 16
United States v. O'Brien, 391 U.S. 367 (1968) 10, 19, 23
United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 4
Williams v. Rhodes, 393 U.S. 23 (1968) 23

FEDERAL COMMUNICATIONS COMMISSION DECISIONS AND ORDERS

Direct Broadcast Satellite, 90 F.C.C.2d 676 (1982) 14
Fairness Report in Docket No. 84-282, 102 F.C.C. 2d 145 (1985) 14, 15
First Report in Docket No. 15415, 1 F.C.C.2d 387 (1965) 3-4
Instructional TV Fixed Service, 94 F.C.C.2d 1203 (1983) 14
Low Power Television Service, 51 Rad. Reg. 2d (P&F) 476 (1982) 14
Marsh Media, Ltd., 67 F.C.C.2d 1516, *recon. denied*, 68 F.C.C. 2d 712 (1978) 7
Multipoint Distribution Service, 45 F.C.C.2d 616 (1974) 14
Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397, 15 F.C.C.2d 417 (1968) 4

TABLE OF AUTHORITIES—Continued

Page

Report and Order in Docket No. 19988, 49 F.C.C. 2d 1090 (1974) 5, 22
Report and Order in Docket No. 20988, 79 F.C.C. 2d 663 (1980), *aff'd sub nom. Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2nd Cir. 1981) 5-6
Second Report and Order in Docket No. 18397, 23 F.C.C.2d 816 (1970) 4, 5, 10, 22
Second Report and Order in Docket No. 20423, 55 F.C.C.2d 540 (1975) 6
Sixth Report and Order, 1 Rad. Reg. (P&F) 91:599 (1952) 3, 20
Third Report and Order in Docket No. 20423, 97 F.C.C.2d 65 (1984) 6, 7

CONSTITUTION, STATUTES AND REGULATIONS

Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U.S.C. § 533(a) ..... *passim*
First Amendment, U.S. Constitution ..... *passim*
Fifth Amendment, U.S. Constitution 2, 22
28 U.S.C. § 1254(1) 2
28 U.S.C. §§ 2343, 2344 8
47 U.S.C. § 402(a) 8
47 C.F.R. § 73.3555(c)(3) 20
47 C.F.R. § 76.501(a)(2) ..... *passim*

MISCELLANEOUS

Affidavit of Dr. James C. Miller III, Appendix A, Petition for Deletion of Section 76.501, RM-3810 (November 24, 1980) 19
Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213 15
Comment, *The Spectrum Scarcity Doctrine: A Constitutional Anachronism*, 39 S.W.L.J. 827 (1985) 15
Comment, *The Supreme Court, 1983 Term*, 98 Harv.L.Rev. 87 (1984) 15

TABLE OF AUTHORITIES—Continued

Page

FCC News Release and Fact Sheet Regarding Cable Carriage Decision (MM Docket No. 85-34) (released August 7, 1986) 21

FCC Policy on Cable Ownership, FCC Staff Report (1981) 6, 18-19

Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex.L.Rev. 207 (1982) 15

H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984) .. 6, 10

Note, *Broadcasters' First Amendment Rights: A New Approach?*, 39 Vand.L.Rev. 323 (1986) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

MARSH MEDIA, LTD.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals, reported at 798 F.2d 772, appears as Appendix A at pp. 1a-10a. The *Memoradum Opinion and Order* of the Federal Communications Commission ("FCC") denying Marsh Media, Ltd.'s ("Marsh") petition for reconsideration in Docket No. 20423, not officially reported, is reprinted in Appendix B, pp. 11a-20a. The FCC's *Memorandum Opinion and Order* denying Marsh's petition for deletion is reported at 102 F.C.C.2d 81 and appears as Appendix C, pp. 21a-28a.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1986, and is reprinted in Appendix D, pp. 29a-30a. Marsh's petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals on September 29, 1986, and the court's order appears as Appendix E, pp. 31a-32a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part:

"Congress shall make no law . . . abridging the freedom of speech . . . ."

The Fifth Amendment provides, in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 613(a) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 533(a), provides:

> It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

The FCC's broadcast/cable cross-ownership rule, 47 C.F.R. § 76.501 provides, in relevant part:

> (a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(2) A TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of Part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e. the area within which the system is serving subscribers).

STATEMENT OF THE CASE

This petition involves the constitutionality of Section 613(a) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 533(a) ("1984 Cable Act"), and a parallel and pre-existing FCC regulation, 47 C.F.R. § 76.501. These provisions prohibit a television broadcast licensee like Marsh from acquiring any interest in a cable television system which operates in any community located in whole or in part within the "Grade B" contour of its television station.[1] They caused the FCC to order Marsh to divest one-half of its interest in the Amarillo, Texas cable system. In addition, Marsh is restricted from acquiring cable interests in any of the five Texas, New Mexico and Oklahoma communities in which its principals currently hold television broadcast licenses.

A. Adoption of the Cross-Ownership Restriction

The cross-ownership restriction at issue here was initially considered in 1965 when the FCC expressed concern that ownership of cable systems (or "CATV", for community antenna television) by a single television broadcaster could lead to abusive restriction of the signal distribution of its rivals or degradation of its broadcast signal to force viewers to subscribe to CATV service. *First Report in Docket No. 15415*, 1 F.C.C.2d 387 (1965). Then, viewing CATV as a transmission means rather than a media voice, the FCC rejected the need for restriction:

---

[1] The Grade B contour defines the area within which a television station provides a signal of a quality "acceptable to the median observer" at the best 50 percent of all receiver locations at the outer limits of the service area at least 90 percent of the time. Sixth Report and Order, 1 Rad. Reg. (P&F) 91:599, 91:630 (1952).

> The rules that the Commission has promulgated and proposes to promulgate appear to be adequate to prevent discriminatory use of a CATV system to favor one local broadcaster against another. The Commission's general rules should ordinarily suffice to insure a technically efficient operation by any broadcaster, and any broadcaster who fails to make a reasonable effort to put out an efficient signal runs the risk of losing his license.

Id. at 389.

By 1968, the FCC began to develop more comprehensive cable regulations which recognized cable not as merely a retransmitter of broadcast signals, but as a new source of local speech content. The Commission again proposed to ban local broadcast/cable cross-ownership, this time expressing concern that broadcasters might suppress the economic and editorial development of cable and thus deny its "full benefits" to the viewing public. *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 F.C.C.2d 417 (1968).

In mid-1970, while it could cite no evidence of "monopoly power" or cable suppression in cross-ownership markets, the FCC adopted a rule effectively barring cross-ownership by prohibiting a cable system from carrying the signal of any television station "if such system directly or indirectly owns, operates, controls, or has an interest in" a co-located television station (47 C.F.R. § 74.1131(a), now 47 C.F.R. § 76.501). *See Second Report and Order in Docket No. 18397*, 23 F.C.C.2d 816 (1970).[2] The FCC then required cable systems with 3500 or more subscribers to originate their own programming. The Commission thus theorized that cable

[2] The FCC recognized that its jurisdiction to license cable was only ancillary to its regulatory authority over television. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). Thus, unlike Section 613(a), the language of the prohibition was cast as a restriction on a cable system's carriage of off-the-air broadcast signals, rather than as a direct restriction on cable ownership.

would be an "opinion molder," and justified the cross-ownership restriction under its policy "favoring diversity of control over local mass communications media." *Second Report and Order in Docket No. 18397, supra*, 23 F.C.C.2d at 820.[3] The Commission applied its ban to all cross-owned systems and set an August 10, 1973 divestiture date for all existing cross-ownerships.

After 1970, the FCC never seriously reconsidered the wisdom or constitutionality of the cross-ownership rule despite Marsh's repeated efforts to raise the issue and a number of developments which counseled such review. For example, in 1974, the FCC deleted the program origination requirements for cable systems. *Report and Order in Docket No. 19988*, 49 F.C.C.2d 1090 (1974). Subsequently, the courts struck down the other primary elements of the Commission's comprehensive regulatory scheme for cable, principally on First Amendment grounds.[4] In 1981, taking account of these developments

---

[3] In a footnote, the FCC also noted that the ownership prohibition would be economically desirable "in view of the limited number of broadcast and newspaper media in all communities, and the potential importance of cable facilities in providing many communications services". *Id.* at 817, n.2. Neither the Commission nor the Congress has ever attempted to demonstrate that television/cable cross-ownership actually threatens to create monopoly power in any market, particularly under current competitive conditions.

[4] The D.C. Circuit Court of Appeals overturned restrictions on "pay cable" operations in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Shortly thereafter, in FCC v. Midwest Video Corp., 440 U.S. 689 (1979), this Court struck down the mandatory access, channel construction, and equipment availability sections of the cable rules. In 1980, the FCC eliminated its numerical limits on carriage of distant broadcast signals by cable systems as well as its rules requiring cable systems to black out from distant stations any syndicated programming carried by local stations. Report and Order in Docket No. 20988,

and the rapid growth of competition for television viewers, the Commission's own staff concluded that the broadcast/cable cross-ownership restriction should be rescinded. *FCC Policy on Cable Ownership*, FCC Staff Report (1981). The FCC nevertheless left the prohibition in place.

The Commission did, however, reconsider the divestiture requirement it had imposed in 1970. In 1975, recognizing the harshness of divestiture and the absence of any meaningful showing of cross-ownership abuse, the FCC determined to grandfather all cross-interests in existence on or before July 1, 1970. *Second Report and Order in Docket No. 20423*, 55 F.C.C.2d 540 (1975). In 1984, the Commission reaffirmed this grandfathering provision but limited its application to communities like Amarillo to which two or more television stations were licensed. *Third Report and Order in Docket No. 20423*, 97 F.C.C.2d 65 (1984).

Congress incorporated both the Commission's cross-ownership ban and grandfathering policy into its comprehensive plan for cable regulation under Section 613 of the 1984 Cable Act. No hearings were held on the cross-ownership issue, and no independent Congressional record was compiled. The Congress simply accepted the Commission's prior rationale and enacted the ban "to encourage a diversity of ownership of communications outlets." H.R. Rep. No. 934, 98th Cong., 2d Sess. 55, 56 (1984).

B. Marsh's Challenge to the Cross-Ownership Rule at the Commission

Marsh acquired a 25 percent interest in the Amarillo cable system in 1968, together with a protective right of

---

79 F.C.C. 2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981).

Most recently, in 1985, the D.C. Circuit struck down the FCC's "must-carry" rules as violative of the First Amendment. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 2889 (1986).

first refusal as to the interests of the other owners. In 1977, when two of its partners elected to withdraw, Marsh and the other remaining partner exercised their rights of first refusal and each acquired an additional 25 percent of the Amarillo cable system.[5] The Commission ruled that this 1977 acquisition violated the cross-ownership prohibition because the right of first refusal was not an "interest" which was grandfathered and ordered Marsh to divest its second 25 percent interest in the cable system. *See Marsh Media, Ltd.*, 67 F.C.C.2d 1516, *recon. denied*, 68 F.C.C.2d 712 (1978).

Marsh appealed the FCC's divestiture order to the Fifth Circuit in 1978. That review petition was voluntarily remanded to the FCC in 1980 pending the Commission's overall reconsideration of the cable divestiture requirement. Independent of the proceedings looking toward reconsideration of the rule, Marsh, in November 1980, filed with the FCC its own Petition for Deletion of Rule 76.501, contending that the prohibition of cross-ownership violated the First Amendment and exceeded the FCC's narrowly circumscribed statutory jurisdiction to regulate cable television. Marsh demonstrated through empirical data that there was no basis for the FCC's theory that a cross-owner would operate differently from an independent cable owner or broadcaster. Marsh also raised its constitutional challenge in the docket in which the Commission was considering the scope of divestiture under its *Third Report and Order in Docket No. 20423, supra.*

The FCC did not deal with Marsh's constitutional contentions until after the 1984 Cable Act was signed into law. In denying the Petition for Deletion, the FCC rejected Marsh's policy and statutory challenges because Congress' codification of the prohibition, the Commission

---

[5] Had Marsh failed to exercise its first refusal right, it would have been left the holder of a 25 percent interest, with the other partner holding the remaining 75 percent of the system.

believed, ousted its discretion to delete or amend the rule. Appendix C, p. 22a. The Commission also denied Marsh's petition for reconsideration of the divestiture requirement in Amarillo, adding in a footnote that Marsh's constitutional position was unavailing since there was no basis for applying a stricter constitutional standard to cable than that applied in connection with the broadcast/newspaper cross-ownership prohibitions which were approved by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (*"NCCB"*). Appendix B, pp. 15a-16a, n.10.

C. Proceedings Before the Fifth Circuit

Marsh then appealed to the Fifth Circuit, pursuant to 47 U.S.C. 402(a) and 28 U.S.C. §§ 2343 and 2344, for review of the FCC decisions. Marsh continued to contend that the right to invest in and operate a cable system was protected by the First Amendment and could not be limited in the absence of a compelling governmental justification for restrictive regulation. The FCC responded that Section 613(a) and Rule 76.501 should be viewed not as cable ownership restrictions but as efforts to achieve diversity in television broadcasting by excluding local cable owners from broadcast licensing. Thus, according to the FCC, the constitutional issue was controlled by this Court's ruling in *NCCB*.

The Fifth Circuit accepted the FCC's post-hoc construction of the ownership restriction and summarily dismissed Marsh's constitutional challenges.[6] The Court agreed with the Commission that this Court's decision in *NCCB* was determinative. Appendix A, pp. 7a, 9a. It viewed the more recent decision in *City of Los Angeles v. Preferred Communications, Inc.*, —— U.S. ——, 106

[6] Before the court below, Marsh also challenged the FCC's decision denying grandfathered status to its right of first refusal. Marsh has chosen not to raise that issue before this Court.

S.Ct. 2034 (1985) (*"Preferred"*) as doing no more than equating the constitutional positions of cable operators and newspaper owners. Appendix A., p. 9a.

Marsh petitioned for rehearing and en banc consideration, contending that the panel had erred in accepting the agency's post hoc transformation of the cable ownership ban into a broadcast licensing regulation. Marsh further contended that even as a broadcast regulation, the ownership restriction could not be sustained under the First Amendment, *inter alia* because there was no record, as required by this Court's recent decision in *Preferred*, to demonstrate that the ban would advance the content diversity goals of broadcast licensing. The petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. THE FORECLOSURE OF CABLE AND BROADCAST SPEECH RIGHTS ON THE BASIS OF A SPECULATIVE, PHYSICAL SCARCITY-BASED GOVERNMENT INTEREST IN DIVERSIFICATION OF BROADCAST MEDIA CONTENT NECESSITATES REVIEW BY THIS COURT: (A) TO REEXAMINE THE OUTDATED PHYSICAL SCARCITY RATIONALE FOR AFFIRMATIVE GOVERNMENT INTRUSION INTO ELECTRONIC SPEECH; AND (B) TO REAFFIRM THE NEED FOR ADEQUATE RECORD SUPPORT OF ANY CONSTITUTIONALLY LEGITIMATE LIMITATION OF FIRST AMENDMENT RIGHTS IN THE ELECTRONIC MEDIA

The broadcast/cable cross-ownership ban of Section 613(a) and Rule 76.501 explicitly limits access by local television broadcasters to the cable medium which this Court has recently held to "implicate First Amendment interests." *Preferred, supra,* 106 S.Ct. at 2037. The ban reciprocally limits access by cable owners to television broadcast licenses, which equally constitute a First Amendment medium. *See, e.g., Red Lion Broadcasting*

Co. v. FCC, 395 U.S. 367 (1969). These absolute foreclosures were imposed without any record demonstrating their impact on media performance and were justified solely by the assumed need to diversify ownership of local media outlets to further an affirmative government responsibility to produce diversity in the marketplace of ideas. *See Second Report and Order in Docket No. 18397, supra*, 23 F.C.C.2d at 820; H.R. Rep. 934, *supra*, at 55, 56.

Outside the electronic media, this Court has made it clear that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Moreover, the Court has emphasized that even such apparently laudable governmental objectives as balancing or diversifying views on public issues in situations where media outlets are economically scarce cannot sustain government intrusions into speech content, as the threat to First Amendment liberties clearly outweighs the benefits of forced diversification of content:

> [H]owever much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that [A]mendment developed over the years.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254 (1974) (footnote omitted). Indeed, even when the government has offered a legitimate objective for speech-restrictive regulation, the Court has required a showing that the objective is in fact achieved with minimal intrusion on speech rights. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Thus, the restraints of Section 613(a)

and Rule 76.501, which intrude on speech rights without record justification, would seem clearly in conflict with the First Amendment as applied outside the electronic media.

The Commission and the Fifth Circuit, however, understood this Court to have taken a different approach to content-directed regulation of the electronic media. They read the decision in *NCCB* to justify exclusion of persons with other local media interests from broadcasting licenses so long as the Congress or the FCC had a rational basis for believing that such exclusion would further content diversification. They understood *NCCB* to hold that the physical scarcity of the electromagnetic spectrum justifies systematic and speculative government intrusion into the content of broadcast speech to enhance the marketplace of ideas. *See* Appendix A, p. 9a. They also correctly perceived that the alleged physical scarcity of the broadcast spectrum is the only principled basis on which this Court's apparently conflicting decisions on electronic and non-electronic speech can be reconciled. This petition asks the Court to recognize the current state of electronic media access and the consequent lack of vitality in the scarcity rationale as a basis for government regulation of the electronic media. It also calls for a review by this Court of the "rational basis" test in light of changing scarcity conditions and last Term's decision in *Preferred.*

A. The Fifty-Year-Old Spectrum Scarcity Rationale for Content-Directed Restraints on the Broadcast Media Should Be Reexamined by This Court in Light of Recent and Rapid Changes in Spectrum Availability and Electronic Media Access

The assumed physical scarcity of means by which radio and television programming can be disseminated in a local community has led this Court to create First Amendment standards uniquely applicable to the broad-

cast media. While the concept of physical scarcity has a long history in this Court, the Court quite recently has questioned its continuing vitality. In *FCC v. League of Women Voters of California*, 468 U.S. 364, 367-77 n.11 (1984), the Court acknowledged that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years," and that the incumbent chairman of the FCC and others had found that the advent of cable and satellite television technology has provided communities with "access to such a wide variety of stations that the scarcity doctrine is obsolete."

The Court indicated that it would await "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* In fact, physical scarcity in the electronic media now has eroded to the point where it is not a meaningful consideration, but government intervention into electronic speech content premised on scarcity has not disappeared. Thus, this Court should now reexamine the issue of whether the powers of intrusion into content previously accorded the government with respect to the electronic media continue to be constitutionally defensible.

The concept of spectrum scarcity was first recognized in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). In that case, however, the Court merely endorsed the Radio Commission's authority to bring order to the use of the radio spectrum by allocating frequencies equitably among the various states and communities to avoid interference and permit the efficient use of radio facilities. While the continuing need for physical allocation of the electromagnetic spectrum, and the government's power to manage that process, is not in dispute, this Court has made clear that other necessary government management of the property or assets required for speech purposes does not legitimize intrusion into speech content. *See, e.g.*,

Preferred, supra, (cable television franchises); *Cox v. New Hampshire,* 312 U.S. 569 (1971) (parade permits).

In *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943), the physical scarcity rationale was extended to indirect content regulation. The Court noted that there were only 660 commercial radio stations nationwide and that "radio is inherently not available to all." Id. at 197. The Court thus sustained the FCC's chain broadcasting rules, which limited the radio networks to ownership of one station in a given market and restricted network control over affiliates, presumably increasing programming diversity at the national level. The Court observed, however, that Congress had not authorized the Commission to refuse licenses to applicants on the basis of their views "or upon any other capricious basis." *Id.* at 226.

The Court revisited the area in *Red Lion Broadcasting Co. v. FCC, supra,* and found physical scarcity "not entirely a thing of the past." 395 U.S. at 396. Finding also that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them," the Court held constitutional the FCC's direct intervention into broadcast content under the "fairness doctrine." *Id.* at 386. *Red Lion,* in turn, provided support for the decision in *NCCB* upholding newspaper/broadcasting cross-ownership restrictions. In *NCCB,* the Court held physical scarcity to be "well known" and noted that "no one here questions" the government's authority to regulate broadcast licensing for the purpose of increasing content diversity. 436 U.S. at 799 (1978).

The FCC and the Fifth Circuit's willingness to rely on *NCCB* in this case without independently considering the continuing viability of its underlying physical scarcity rationale is consistent with the view in the appellate courts that until this Court chooses "to revisit this area of the law . . . neither we nor the Commission are free

to seek new rationales to remedy the inadequacy of the doctrine in this area." *Telecommunications Research and Action Center and Media Access Project v. FCC*, No. 85-1160, slip op. at 16-17 (D.C. Cir. Sept. 19, 1986), *pet. for reh'g pending*. The present case, presenting unequivocal Commission and Congressional reliance on the physical scarcity rationale to justify indirect content regulation, provides the occasion to revisit the issue taking account of the following critical technological and regulatory developments which have dramatically altered the electronic media marketplace.

First, in the seventeen years since the decision in *Red Lion*, the FCC has substantially increased the number of channels available for over-the-air broadcasting. As of 1984, 96 percent of all television households received five or more television signals, and the number of UHF television stations alone had risen 66.4 percent since 1974. *Fairness Report in Docket No. 84-282*, 102 F.C.C.2d 145, 203-05 (1985) ("*Fairness Report*"). In addition, the FCC has authorized a substantial number of new low power television frequencies which are not yet fully distributed. *See Low Power Television Service*, 51 Rad. Reg. 2d (P&F) 476 (1982). Moreover, the Commission has expanded local television availability to the microwave frequency band through both single channel and multichannel multipoint distribution systems ("MDS"). *See Multipoint Distribution Service*, 45 F.C.C.2d 616 (1974); *Instructional TV Fixed Service*, 94 F.C.C.2d 1203 (1983). Further, the Commission has allocated multichannel spectrum space in the satellite band for direct-to-home broadcasting services. *See Direct Broadcast Satellite*, 90 F.C.C.2d 676 (1982).

Second, since the decision in *Red Lion*, the use of cable to transmit multiple channels of television programming has vastly increased, with 12 times as many households reached in 1985 as in 1974. *Fairness Report*, *supra*, 102 F.C.C.2d at 209. Moreover, this Court's decision in *Preferred* will inevitably accelerate the franchising of these

systems and provide opportunities for multiple cable operations within many local communities.

Third, since the decision in *Red Lion*, the videocassette recorder ("VCR") has emerged with the "potential to become the 'electronic handbill' or indeed even the electronic newspaper of the future." *Fairness Report*, *supra*, 102 F.C.C.2d at 214. The FCC estimates that, by 1990, 68 percent of all television households will possess videocassette players capable of deriving television signals from infinitely available videotapes. *Id.*

Fourth, responding to this Court's invitation in *League of Women Voters*, *supra*, the FCC has issued its 1985 *Fairness Report* recognizing this "plethora of alternative electronic voices" and concluding that it is now "unnecessary to rely upon intrusive government regulation to assure that the public has access to the marketplace of ideas." *Id.* at 148. Indeed, the *Fairness Report* suggests that "the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to other media." *Id.* at 155.[7]

Finally, the Commission and the Courts of Appeals are facing a number of sensitive and difficult broadcast licensing and regulatory issues where guidance from this Court on the continuing validity of the physical scarcity rationale and the content diversification objective would

---

[7] Legal commentators also have questioned the vitality of the spectrum scarcity rationale and the disparate treatment of print and electronic media. *See, e.g.*, Note, Broadcasters' First Amendment Rights: A New Approach?, 39 Vand. L. Rev. 323, 347-49 (1986); Comment, The Spectrum Scarcity Doctrine: A Constitutional Anachronism, 39 S.W.L.J. 827, 832-38 (1985); Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, 220-226; Comment, The Supreme Court, 1983 Term, 98 Harv.L.Rev. 87, 205-216 (1984); Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-226 (1982).

be of enormous benefit. *E.g., Steele v. FCC*, D.C. Cir. No. 84-1176 (minority and female preference challenge remanded to FCC for development of a record); *Shurberg Broadcasting of Hartford, Inc. v. FCC*, D.C. Cir. No. 84-1600 (pending motion to remand challenge to minority ownership distress sale policy); *Meredith Corp. v. FCC*, D.C. Cir. No. 85-1723, and *Radio T.V. News Directors Assn. v. FCC*, D.C. Cir. No. 85-1691 (pending fairness doctrine challenges); and *Telecommunications Research and Action Center and Media Access Project v. FCC, supra* (pending motion to reconsider applicability of fairness doctrine provisions to teletext medium).

For the physical scarcity of broadcast channels to have constitutional significance, it must physically restrain the ability of a speaker to deliver a video message and the ability of a listener to receive that message. *See Red Lion, supra.* It will inevitably be true in the electronic media, as in the print media, that different access means will have higher economic costs. This Court, however, has unequivocally rejected such economic scarcity as a constitutional basis for intrusion into content. *Tornillo, supra*, 418 U.S. at 254.

The technological and regulatory advances outlined above have eliminated physical scarcity as a limitation on access to television programming by those willing to pay the economic price. In fact, none of the direct broadcast satellite frequencies allocated to television is yet in use, and many MDS frequences, *including five in the Amarillo market where the Commission has a scarcity-based divestiture order outstanding against Marsh*, are also vacant. It is, thus, both appropriate and timely for this Court to take certiorari and reexamine the vitality of the physical scarcity doctrine and the related content diversification objective as a basis for governmental regulations affecting protected First Amendment rights which clearly could not be sustained outside the electronic media.

B. The "Rational Basis" Test Which Permitted the Lower Court to Sustain the Broadcast/Cable Cross-Ownership Prohibition Without Any Record Showing of Its Nexus to Diversification of Broadcast Speech Should Be Reexamined to Conform Review of Restraints on the Broadcast and Related Media to This Court's Nonbroadcasting Speech Decisions

The lower court's assumption that diversification of content is a constitutionally legitimate objective was coupled with its refusal to consider Marsh's demonstration that Section 613(a) and Rule 76.501 did not advance that objective. The FCC merely hypothesized, without any evidentiary record, that the cross-ownership restriction would further the content diversification objective. Given this Court's decision in *NCCB*, *supra*, the Court of Appeals did not consider the absence of a record to be significant:

> To the extent that the Rule is based on policy goals and educated "guestimates" by the Commission, we find no meaningful difference from the "judgmental or predictive" conclusions undergirding the divestiture order in National Citizens Committee, 436 U.S. at 813.

Appendix A, p. 9a.

Relying upon surmise and speculation to justify abridgment of First Amendment rights in the electronic media, however, conflicts directly both with longstanding non-electronic media doctrine and with this Court's ruling in *Preferred.*

In *Preferred*, this Court made clear that where First Amendment rights are involved, reliance on "legislative judgment" to support the nexus between the regulation and a legitimate government interest is improper. As stated by this Court:

> Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional chal-

> lenges typically does not have the same controlling force . . . . This Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." [*Members of City Council v.*] *Taxpayers for Vincent*, 466 U.S. [789,] 803, n.22 (1984); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-844 (1978).

Preferred, supra, 106 S. Ct. at 2038.

The need for record evidence to sustain legislation is even greater where, as in the instant case, the viability and strength of the theory underlying the legislation—i.e., physical spectrum scarcity—is in doubt. The failure to hold legislators and administrative agencies to a standard higher than "educated guestimates" can lead, as it has here, to the imposition of wholly unjustified restraints that by no stretch of the imagination could withstand review under traditional First Amendment tests.

Neither Congress nor the FCC has ever compiled any evidence indicating that the role which cable operators play in local opinion formation requires cross-ownership limitations to guarantee a "diversity" of media voices. Nor is there a record which demonstrates that the cross-ownership restriction is necessary to prevent cross-owners from constraining cable development to enhance broadcasting values or, conversely, broadcasting an inferior signal to spur the growth of their cable systems. To the contrary, all available empirical evidence, including a study conducted by the FCC's own staff, refutes the Commission's theoretical assumption that a cross-owner would impede the development of either his cable system or his broadcast property, and demonstrates that there is no content diversification or economic basis for restricting cross-ownership.

In its 1981 report, the FCC's staff concluded that there is no need to restrict broadcast/cable cross-own-

ership. *FCC Policy on Cable Ownership*, FCC Staff Report (1981) at 5. The staff found the market for video programming to be "workably competitive" and stated its belief "that in general a policy extending free entry into cable to all interested firms is most likely to contribute to a rapidly growing, technologically dynamic industry that meets consumer needs." *Id.* In addition, a study commissioned by Marsh and conducted by Dr. James C. Miller, an independent expert, demonstrated that there was no basis for the theory that a cross-owner would impede the development of his cable system to benefit his television station. Affidavit of Dr. James C. Miller III, Appendix A, Petition for Deletion of Section 76.501, RM-3810 (November 24, 1980).[8]

In its First Amendment decisions in cases not involving the now suspect spectrum scarcity rationale, this Court has long held that careful scrutiny of governmental action is required when it places even incidental limitations on speech rights. Thus, in *United States v. O'Brien*, *supra*, 391 U.S. at 377, the Court held that a governmental regulation which burdens free expression can be sustained only "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The broadcast/cable cross-ownership ban is neither an "incidental" restriction on First Amendment rights nor one which is narrowly tailored to achieve the stated governmental objective. The restriction acts not as a reasonable limitation on the time, place, or manner in which First Amendment freedoms may be exercised, but as an

[8] Dr. Miller, then Co-Director and Resident Scholar at the Center for Study of Government Regulation at the American Enterprise Institute, served as Chairman of the Federal Trade Commission and is now the Director of the Office of Management and Budget.

absolute prohibition which forecloses a particular class of persons from entry either into broadcasting or into cable operation. Moreover, the statutory restriction prohibits common ownership of cable and television properties without regard to the extent of the overlap of the television and cable service areas or the nature or number of competing media outlets.

Thus, Section 613(a) prohibits a television station licensee from operating a cable system if the station's predicted Grade B contour covers *any portion* of the community served by the cable system. In other words, the statutory ban applies even if the cable system serves only a handful of subscribers at the outer fringe of the station's service area—an area typically extending 55 miles or more from the city of license. By contrast, the FCC's television/newspaper cross-ownership restriction, on which the cable restriction purportedly is modeled, applies only if the community in which the newspaper is published is encompassed entirely by the much smaller "Grade A" service contour of the station. *See* 47 C.F.R. § 73.3555(c)(3).[9]

The broadcast/cable cross-ownership ban also applies without regard to the level of competition, or even the number of television stations, in the local media market. Similarly, the prohibition fails to take into account either the number of cable systems in the market or their channel capacities. While cable franchises have historically been awarded on an exclusive basis within any given city, this Court's decision in the *Preferred* case may well signal an age of multiple franchises. The cross-ownership restriction, however, may operate to limit new cable entry and hence frustrate added competition in the video marketplace.

---

[9] The Grade A contour defines the area within which a television station provides an acceptable signal at the best 70 percent of the receiver locations at the outer limits of the service area at least 90 percent of the time. Sixth Report and Order, *supra*, 1 Rad. Reg. (P&F) at 91:630 (1952).

In *Quincy Cable TV, Inc. v. FCC, supra*, the FCC's rules regarding mandatory carriage of local television signals by cable systems were held to be unconstitutional.[10] Local broadcasters may thus be ousted from cable systems, lose access to some of their existing audience, and be driven economically to construct or threaten additional cable systems. The cross-ownership restriction, however, precludes local broadcasters from contemplating a competing cable system and thus restricts the very parties with the greatest potential incentive to be new entrants in the cable market. In the name of diversity, the cross-ownership restriction may operate to limit the number of voices in a community, rather than to enhance the opportunity for diverse speech.

Perhaps most significantly, the ban operates without regard to the role played by the cable operator in a particular local media market, or even the role typically played by cablecasters. The newspaper/broadcast rules at issue in *NCCB* were based on a detailed examination of the role played in local opinion formation by daily newspapers and television stations. In contrast, no record pertaining to the local importance of cable owners in the opinion process or economic process has ever been compiled by the FCC or the Congress. Indeed, as discussed above, the "evidentiary" record compiled by the Commission prior to adoption of its Section 76.501 is virtually non-existent, and subsequent studies, including a major staff report, show no public interest basis whatsoever for the rule.

The Commission thus could cite no evidence to support the suggestion that cable operators occupy the "dominant

---

[10] The FCC has announced that it will re-institute a modified set of "must-carry" rules. Even if these rules pass constitutional muster, the great majority of cable operators will now have the discretion to select from among the competing local television stations those whose signals will be carried. *See* FCC News Release and Fact Sheet Regarding Cable Carriage Decision (MM Docket No. 85-349) (released August 7, 1986).

role as sources of local news and other information" that was a basis for adoption of the newspaper cross-ownership ban. *See NCCB, supra*, 436 U.S. at 783. In fact, the Commission, in adopting the broadcast/cable prohibition, relied on its local origination and access rules, which have since been repealed, to presume an important local editorial role for cable. *Second Report and Order in Docket No. 18397, supra*, 23 F.C.C.2d at 817. *See FCC v. Midwest Video Corp., supra*; *Report and Order in Docket No. 19988, supra*. Similarly, the legislative history of the 1984 Cable Act makes clear that Congress made no effort whatsoever to develop a record as to the need for the cable ownership restriction embodied in Section 613(a).

In the absence of such a record, the broadcast/cable cross-ownership ban cannot withstand analysis even under the deferential test employed in *NCCB* and relied upon by the Court of Appeals below, much less the higher level of scrutiny applied by this Court in its First Amendment decisions in other areas and typified by the *O'Brien* test cited above. Moreover, a *selective* restriction such as the broadcast/cable cross-ownership ban, which singles out a class of persons for different treatment, should be reviewed even more carefully than a universally applicable limitation. Such a discriminatory regulation raises serious questions not only under the First Amendment, but also under the equal protection guarantee of the Fifth Amendment.[11] Indeed, a denial of equal protection is subject to "strict scrutiny" where the classification involved affects "basic civil rights." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

It can no longer be debated that the operation of cable systems and broadcast properties both implicate protected

[11] *See* Johnson v. Robison, 415 U.S. 361, 364-65 n.4 (1974); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

First Amendment freedoms, and that those freedoms are among the most important of our "basic civil rights." Thus, any statutory provision which selectively limits those freedoms should be subjected to the most rigorous and searching review. Indeed, this Court has long held that strict scrutiny of governmental action is required where a classification is even "closely intertwined" with First Amendment rights. *Chicago Police Department v. Mosley*, 408 U.S. 92, 95, 99 (1972) ("*Mosley*"). *See also Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Niemotko v. Maryland*, 340 U.S. 268, 271-73 (1951). *Cf. NAACP v. Button*, 371 U.S. 415, 438 (1963). Under this standard, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley, supra*, 408 U.S. at 95.[12]

In *Mosley*, the Court struck down, as violative of the equal protection guarantee, a city ordinance prohibiting all picketing within 150 feet of a school, except peaceful labor picketing. The Court held, "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject . . . Chicago's ordinance imposes a selective restriction on expressive conduct far 'greater than is essential to the furtherance of [a substantial governmental] interest.' " *Mosley, supra*, 408 U.S. at 101-102, *quoting United States v. O'Brien, supra*, 391 U.S. at 377.[13]

---

[12] This equal protection standard, then, is closely related to the *O'Brien* First Amendment test. While the focus in equal protection scrutiny is on the challenged classification, the critical questions asked are essentially the same: "whether there is a substantial governmental interest being served and whether the statute—particularly the challenged classification—is narrowly tailored to serve that interest." Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1123 (D.C. Cir. 1978).

[13] Equal protection concepts have informed this Court's decisions in numerous other First Amendment cases. *See, e.g.*, Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976); Williams v. Rhodes, *supra*, 393 U.S. at 30-34

Here, as discussed above, even if it were to be assumed that the Commission has a legitimate interest in promoting content diversity through its allocation of broadcast licenses, neither the Commission nor Congress has made any effort whatsoever to develop a record as to the need for the cable ownership restrictions of Section 613(a). Absent such a record, it is impossible to determine whether cable operators have greater or less local influence than weekly newspapers, national print media such as the Wall Street Journal or USA Today, operators who use multi-channel microwave frequencies to distribute television programming, national programmers such as the Cable News Network or Home Box Office, videocassette producers or store proprietors, or movie theatre operators, *none of whom* are precluded from holding a local television broadcast license. Indeed, the limited record that does exist shows that common ownership of cable and television properties has no impact on the operation or development of either organ of expression. Thus, the selective classification of cable operators as ineligible to become broadcast licensees, or of television station owners as ineligible to operate cable systems, does not rest upon any "ground of difference having a fair and substantial relationship to the object of the legislation." *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971), *quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

On the contrary, the Court of Appeals has allowed Congress and the FCC to foreclose rights of free speech in the face of record evidence which demonstrates that such foreclosure is unnecessary. This case, therefore, presents this Court with an important opportunity to reexamine the unjustifiably deferential "rational basis" test employed by the Fifth Circuit and to specify the type of record necessary to sustain limitations on the First Amendment rights of broadcasters or cable owners. In light of the

---

(1968); Cox v. Louisiana, 379 U.S. 536, 555-58 (1965); Niemotko v. Maryland, *supra*.

importance of this issue to the broadcast and cable industries and to the resolution of other cases now pending in the lower courts, certiorari should be granted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BERT W. REIN *
JOHN C. QUALE
JAMES R. BAYES
DIANE L. GOLDMAN
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Petitioner
Marsh Media, Ltd.
* Counsel of Record

November 13, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-4808 & 85-4319

MARSH MEDIA, LTD.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

Filed August 27, 1986

Before: Homer Thornberry, Henry A. Politz and Carolyn Dineen Randall, Circuit Judges.

Opinion by Judge Henry A. Politz

On Petitions for Review of Decisions
of the Federal Communications Commission

OPINION

HENRY A. POLITZ, Circuit Judge:

Marsh Media, Ltd. petitions for review of two orders of the Federal Communications Commission which de-

clined to reconsider a regulation limiting cross-ownership of a television station and a cable television system in the same market (our docket No. 84-4808) and required Marsh to divest itself of part of its interest in an Amarillo, Texas, cable system (our docket No. 85-4319). We deny the petitions for review.

Background

In 1965 Marsh, owner of Amarillo television station KVII-TV, and three partners received a franchise to establish a cable television system in Amarillo. Each partner received a 25% interest in the cable venture, called Total Television of Amarillo (TTA), and a right of first refusal should any other partner choose to sell its interest.

During the 1960s, consistent with its goal of maintaining diversity in mass-media ownership, the Commission became concerned with the effect of common ownership of television stations and cable systems in the same market area, *see Notice of Inquiry in Docket 15415*, 29 Fed. Reg. 5416 (April 16, 1964), but determined that restrictions on such ownership were not warranted. *First Report in Docket 15415*, 1 F.C.C.2d 387 (1965). For several years, the issue was treated on an *ad hoc* basis. *See, e.g., General Electric Cable Corp.*, 10 F.C.C.2d 198 (1967); *Lorain Community Broadcasting*, 13 F.C.C.2d 106 (1968); *see also Citizens TV Protest Committee v. FCC*, 348 F.2d 56 (D.C. Cir. 1965). The Commission noticed its intention to re-examine the matter in Docket 17371, 7 F.C.C.2d 853 (1967). As a result of its inquiry, the Commission proposed to prohibit prospectively all television station-cable system common ownership in the same market. Compliance was to be accomplished by divestiture. *Notice of Proposed Rulemaking in Docket 18397*, 15 F.C.C.2d 417 (1968). In 1970, the Commission adopted the restrictions as proposed. *Second Report and Order in Docket 18397*, 23 F.C.C.2d 816 (1970), *reconsideration denied in part*, 39 F.C.C.2d 377 (1973).

In 1975, after enacting a prospective ban on co-located daily newspaper-broadcast combinations and ordering divestiture of existing combinations in several "egregious" cases, *Second Report and Order in Docket 18110*, 50 F.C.C.2d 1046 (1975), *amended*, 53 F.C.C. 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), the Commission decided to reconsider its *Second Report and Order in Docket 18397*, *supra*, and instituted Docket 20423, 52 F.C.C.2d 161 (1975). The Commission then promulgated the regulation which forms the basis for Marsh's petitions, *Second Report and Order in Docket 20423*, 55 F.C.C.2d 540 (1975), *reconsideration denied*, 58 F.C.C.2d 596 (1976), codified at 47 C.F.R. § 76.501.

The 1975 regulation prohibited cable system ownership by a person owning an interest in a television station whose predicted Grade B contour, defined in 47 C.F.R. § 73.684, "overlaps in whole or in part the service area of" the cable system. 47 C.F.R. § 76.501(a)(2). The regulation contained a "grandfather" clause exempting cable system interests owned on July 1, 1970. 47 C.F.R. § 76.501(b)(1). Divestiture was required for interests acquired after that date.

In 1977 Stauffer Publications, one of the TTA partners, proposed to acquire the interests of two of the other partners. At that time Stauffer did not own any interest in any Amarillo television station. Marsh exercised its right of first refusal and bought the interest of one of the two selling partners. Pursuant to the Rule, 47 C.F.R. § 76.501, the Commission ordered Marsh to divest itself of the recently acquired 25% interest, based on its determination that the interest was not grandfathered.[1] *Marsh Media, Ltd.*, 67 F.C.C.2d 1516 (1978), *reconsidera-*

[1] Marsh's initial 25% interest in TTA, acquired in 1968, was grandfathered by the Rule; its divestiture was not required. The Commission did not consider the right of first refusal to be a pre-Rule vested interest.

tion denied, 68 F.C.C.2d 712 (1978). Marsh sought review by this court but, by consent, the matter was remanded to the Commission when it determined to reconsider the Rule in light of the Supreme Court's intervening decision in *FCC v. National Citizens Committee for Broadcasting. Further Notice of Proposed Rulemaking in Docket 20423*, 81 F.C.C.2d 150 (1980).

After considering the comments received in response to the *Further Notice*, the Commission issued its *Third Report and Order in Docket 20423*, 97 F.C.C.2d 65 (1984), *reconsideration denied*, FCC Docket No. MM 85-232 (May 3, 1985), reaffirming its decision to prohibit common ownership interests in co-located television stations and cable systems which came into being after July 1, 1970.[2] In its enactment of Section 613(a) of The Cable

---

[2] As amended through October 1, 1984, 47 C.F.R. § 76.501 provides:

> (a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:
>
> (1) A national television network (such as ABC, CBS, or NBC); or
>
> (2) A TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of Part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).
>
> (b) *Effective date.*
>
> * * * *
>
> (2) The provisions of paragraph (a)(2) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour en-

Communications Policy Act of 1984, Congress codified the Commission's regulatory scheme on cross-ownership, 47 U.S.C. § 533(a).[3] *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 56, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4693.

In petition No. 84-4808, Marsh seeks review of the order of the Commission dismissing as moot its 1980 petition to institute a rulemaking proceeding to delete 47 C.F.R. § 76.501 on the ground that the Commission had no discretion or authority to delete the Rule after the enactment of §613(a) of the 1984 Act. In No. 85-4319, Marsh seeks review of the denial of its petition for reconsideration of the *Third Report and Order in Docket 20423.* FCC Docket No. MM 85-232 (May 3, 1985). In denying Marsh's petition for reconsideration, the Commission also reaffirmed its 1978 decision that Marsh's 1977 interest in TTA violated the Rule and that its right of first refusal was not a grandfathered

---

compassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

[3] As is pertinent to this case, 47 U.S.C. § 533 provides:

(a) It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

* * * *

(c) The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

* * * *

(f) This section shall not apply to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.

interest under the Rule and, therefore, not protected as such under the 1984 Act. The Commission ordered Marsh to divest itself of the 25% interest in TTA acquired in 1977. We consolidated the two petitions for review.

Analysis

Marsh advances three arguments in support of its petitions for review: (1) the Commission had no statutory authority to promulgate 47 C.F.R. § 76.501 prior to enactment of the 1984 Act; (2) if the Rule was within the Commission's authority when promulgated, Marsh's 1977 interest in TTA does not violate the Rule because it is covered by the Rule's grandfather clause; and (3) if the Rule was within the Commission's pre-1984 Act authority and if Marsh's 1977 interest is not grandfathered, the Rule violates the first amendment.

Authority to Promulgate the Rule

Marsh argues initially that the Rule is null because the Commission had no authority to promulgate the Rule until it explicitly was accorded jurisdiction over cable systems by the 1984 Act. If Marsh is correct and the Rule is thus voided, Marsh's 1977 interest is grandfathered by § 613(f) of the 1984 Act, 47 U.S.C. § 533(f).

Prior to the 1984 Act, the FCC's authority to regulate cable was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). This limitation was consistently recognized. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141 (5th Cir.), *cert. denied*, 449 U.S. 954 (1980); *see generally* Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act*

on the Coaxial Wires, 19 Ga.L.Rev. 543, 547-50 (1985); Comment, *FCC Authority Over Cable Television*, 1979 Wis.L.Rev. 962. Under the "reasonably ancillary" test, the FCC could generally act "only for ends for which it could also regulate broadcast television [or] . . . to regulate to achieve 'long-established' goals or to protect its 'ultimate purposes.'" *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

Marsh maintains that as a direct regulation of cable television systems the Rule fails the reasonably ancillary test. This argument is off target. It is of course correct that prior to the 1984 Act the FCC had no direct authority over cable, just as it had no authority to regulate the print media. Nonetheless, the Supreme Court upheld the Commission's regulation limiting cross-ownership of co-located print and broadcast media as a valid exercise of the Commission's authority over the broadcast media. *FCC v. National Citizens Committee for Broadcasting.* The Rule now before us is likewise an exercise of the Commission's authority over television license holders. By the Rule the Commission seeks to regulate and limit a television station and a cable system in the same market area. As such, the Rule is within the Commission's authority to regulate the broadcast media, *id.*, 436 U.S. at 793-97. Marsh's contrary argument lacks persuasive force. We conclude that the Commission had the authority to promulgate the Rule prior to enactment of the 1984 Act.[4]

Application of the Rule

Marsh next maintains that the Commission erroneously reads the grandfather clause, 47 C.F.R. § 76.501(b)(2). The Commission determined that the right of first re-

[4] Marsh's petition in No. 84-4808 asked the Commission to delete the Rule. We agree with the Commission that the 1984 Act deprived it of any discretion and authority in the matter.

fusal which Marsh acquired in 1968 was not an ownership interest covered by the grandfather clause, but was, rather, merely the equivalent of a conditional stock option. *Marsh Media, Ltd.*, 67 F.C.C.2d at 1523. Marsh argues that it is illogical and irrational to grandfather owners of 100% cross-interests in existence before July 1, 1970, but not to grant to a minority owner the same privilege for its right of first refusal, a commonly used, entirely legal method for protecting one's ownership position.

As a reviewing court we are "not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986) (*en banc*). *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *United States v. Larionoff*, 431 U.S. 864 (1977); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Mercy Hospital of Laredo v. Heckler*, 777 F.2d 1028 (5th Cir. 1985). Whatever the merit of Marsh's policy arguments, we find nothing in pertinent legislation or the Rule which disposes of the issue whether a right of first refusal is an ownership interest for purposes of the grandfather clause. The Commission has been consistent in its interpretation of its Rule, and this interpretation is not plainly erroneous. We must therefore accord it "controlling weight." [5]

---

[5] Marsh's reliance on *Stauffer Publications, Inc.*, 25 Rad.Reg.2d (P&F) 111 (1972), involving the same TTA partnership agreement here at issue, is inapt. Stauffer sought and received from the Commission a temporary waiver of the 1970 regulation in order to acquire an additional 25% interest in TTA pursuant to its right of first refusal. The Commission granted Stauffer a temporary waiver until August 10, 1973. Although the issue of whether the right of first refusal was an ownership interest was not squarely presented, had the Commission then decided it was an ownership interest no temporary waiver would have been required. Marsh's claim that the Commission's interpretation of the grandfather

Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (*quoting Bowles*).[6]

Constitutionality of the Rule and 47 U.S.C. § 533(a)

Finally, Marsh and *amicus*, Freedom of Expression Foundation, argue that both the Rule and 47 U.S.C. § 533(a) violate Marsh's first amendment rights. This argument is foreclosed by the Supreme Court's decision in *FCC v. National Citizens Committee for Broadcasting* upholding, against a first amendment challenge, a rule of the Commission restricting cross-ownership of co-located daily newspapers and television stations.[7]

Marsh attempts to distinguish the *National Citizens Committee* case by arguing that the record there was significantly more developed. We are not persuaded. The Rule was the subject of three rulemaking procedures during which an extensive record was developed. To the extent that the Rule is based on policy goals and educated "guestimates" by the Commission, we find no meaningful difference from the "judgmental or predictive" conclusions undergirding the divestiture order in *National Citizens Committee*, 436 U.S. at 813. *See also Achocaso-Sanchez v. INS*, 779 F.2d 1260 (7th Cir. 1985);

---

clause has changed is inaccurate. *See also Meyer Broadcasting Co.*, 54 F.C.C.2d 224 (1975); *McClatchey Newspapers*, 46 F.C.C.2d 987 (1974); *Kern Cable Co.*, 33 F.C.C.2d 823 (1971); *Gill Industries*, 33 F.C.C.2d 818 (1971) (all involving requests to increase ownership interests under the Rule).

[6] Since Marsh's 1977 interest in TTA violated 47 C.F.R. § 76.501(a)(2) and is not grandfathered, it also violates 47 U.S.C. § 533(a) and is not grandfathered by 47 U.S.C. § 533(f) because it was inconsistent with that rule on July 1, 1984.

[7] The recent decision in *City of Los Angeles v. Preferred Communications, Inc.*, —— U.S. ——, —— L.Ed.2d —— (1986), provides Marsh no succor. Whatever the measure of first amendment protection to be accorded cable television systems, it would not be greater than that enjoyed by the newspaper publishers in *FCC v. National Citizens Committee for Broadcasting*.

Air Products & Chemicals, Inc. v. FERC, 650 F.2d 687 (5th Cir. 1981).

Conclusion

Concluding that the challenged orders are within the grant of authority to the Commission and that each is the product of a valid exercise of that authority, the petitions for review are DENIED.

APPENDIX B

MM
FCC 85-232

35791

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20423

IN THE MATTER OF AMENDMENT OF PART 76, SUBPART J, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO CABLE TELEVISION SYSTEMS; AND POSTPONEMENT OF DIVESTITURE REQUIREMENT OF SECTION 75.501 RELATIVE TO PROHIBITED CROSS-OWNERSHIP IN EXISTENCE ON OR BEFORE JULY 1, 1970

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1985; Released: May 3, 1985

By the Commission: Commissioner Rivera concurring in the result.

Introduction

1. Before the Commission is a petition for reconsideration filed by Marsh Media, Ltd. (Marsh), on July 6, 1984.[1] In its petition, Marsh requests reconsideration of

[1] Marsh Media, Inc., owns KVII-TV, Amarillo, Texas, and has the same stockholders as Marsh Media, Ltd., which is a partner in Total Television of Amarillo (TTA), the operator of that city's cable television system. This commonly-owned interest was among those grandfathered in the *Third Report and Order*.

the Commission's action in the *Third Report and Order* (*Order*) in the above-captioned proceeding as it affects Marsh's cable/local broadcast television cross-interest.[2] By this action, the Commission reconfirms its earlier decision that only the actual interest held by Marsh before July 1, 1970, is grandfathered.

Background

2. In 1970, when the cable/local broadcast station cross-ownership rules were adopted, Marsh was one of four equal partners in Total Television of Amarillo (TTA), the cable system serving that city. The partnership agreement, dating from 1968, included a "right of first refusal" whereby any partner desiring to sell his interest would have to give the other partners an opportunity to purchase that interest. In 1977, when two of the partners sold out, Marsh and the other remaining partner each acquired a 50 percent interest in TTA. Marsh then asked the Commission for a declaratory ruling that the increase in its ownership interest did not violate the cross-ownership prohibition. The Commission disagreed with Marsh and ruled that the 25 percent interest acquired in 1977 must be divested.[3] On July 24, 1978, Marsh filed a Petition for Review of that decision in the United States Court of Appeals for the Fifth Circuit. In October 1978, the Court granted a Commission motion to hold this case in abeyance pending a reconsideration of the cable/broadcast cross-ownership rules that underlie the decision challenged by Marsh.[4] Subsequently, on February 26, 1980, the Commission and

---

[2] 49 FR 23348 (June 6, 1984).

[3] 67 FCC 2d 1516 (1978), recon. den. 68 FCC 2d 712 (1978).

[4] At that time the Commission's *Second Report and Order* in Docket 20423, 50 FCC 2d 1046 (1975), was under review by the District of Columbia Circuit. At the Commission's request, that proceeding was remanded by the court.

Marsh joined in a motion for voluntary remand of Marsh's petition for review by the Fifth Circuit with the understanding that if Marsh was aggrieved by the outcome at the Commission, it would return to court.

3. On March 29, 1984, the Commission adopted the *Third Report and Order* in the above-captioned proceeding.[5] This *Order* grandfathers all non-egregious cable system/local broadcast television station cross-interests (i.e., the broadcast station is not the only commercial broadcast station providing principal community service to the cable community) that were in existence on or before July 1, 1970.[6]

4. On July 6, 1984, Marsh Media filed a petition for reconsideration of our decision. The petition raises two issues. First, Marsh believes that the Commission should have taken no action with regard to the divestiture of the existing cross-interests until it reevaluated the cable cross-ownership rules, in general.[7] Second, Marsh re-

---

[5] This docket was intended to determine the appropriate divestiture requirement for the commonly-owned, co-located cable systems and broadcast television stations that existed when the Commission adopted a ban on such cross-interests in 1970. Section 76.501 (b) (2) of our rules grandfathers the non-egregious cross-ownership situations that existed on or before July 1, 1970, and defines the effective date to be applied to cause divestiture of the egregious cable/local television cross-interests. This portion of the rule has been reevaluated in numerous proceedings, but has not become effective yet.

[6] Action on those situations that appear to be egregious was deferred until the Commission considered a petition for rulemaking to reevaluate Section 76.501, the cable cross-ownership rules.

[7] On November 24, 1980, Marsh Media filed a petition for a rule making (RM-3810) seeking repeal of the rule that restricts the common ownership of cable systems and co-located television stations. By *Memorandum Opinion and Order*, 49 FR 48313 (December 12, 1984), we denied this petition because our cross-ownership prohibition was codified by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 1 *et seq.*, 98 Stat. 2779, (1984). At

quests a clarification as to the extent that its interest in the commonly-owned Amarillo television station and cable system is grandfathered.

Discussion

5. In this petition, Marsh Media requests that the Commission modify the *Third Report and Order* to include Marsh's entire interest in TTA, including its right of first refusal, in the list of permanently grandfathered cross-interests. Alternatively, Marsh seeks a waiver to permit the retention of its current 50 percent interest in TTA and, should circumstances so dictate, the exercise of its first refusal option to acquire the remaining 50 percent interest in the partnership. Marsh Media argues that the right of first refusal should be considered a valid pre-1970 interest in TTA, entitled to grandfathered status. Therefore, Marsh contends that the 25 percent interest it acquired in 1977, and any subsequent interest it might acquire, in TTA would also be grandfathered.

6. In support of its position, Marsh states that if it had exercised the right of first refusal before 1970, its entire interest would have been grandfathered. In Marsh's view, the fact that it has not yet exercised that right should not alter the result. The petitioner believes that its right of first refusal is analogous to the non-voting interests the Commission recognized when the attribution rules were recently modified.[8] According to Marsh, the Commission concluded that these non-voting interests were a significant means of promoting diversity by increasing the available pool of capital. Marsh claims that its right of first refusal in TTA was intended to serve a similar purpose.

---

that time, we also required divestiture of the remaining cross-interests that appeared to be egregious within three years.

[8] *Report and Order* in Docket 20521 et al., 49 FR 19499 (May 8, 1984).

7. Marsh contends that it is necessary to grandfather the entire interest, including the right of first refusal, to protect its investment in the TTA partnership. Marsh states that it has relied on the protection this right has afforded its minority interest and has invested heavily in the cable system. The petitioner claims that its investments have helped the system grow rapidly and provide valuable community services.[9] Marsh states that its commitment to the development of the cable system has continued, even after its petition was denied in 1978.

8. On January 11, 1985, Marsh Media filed a supplement to its petition for reconsideration. In this pleading, Marsh claims that the provisions of the Cable Communications Policy Act of 1984 (Cable Act) make it clear that any interest held on July 1, 1984, including Marsh's right of first refusal in TTA, is entitled to grandfathered status. The Cable Act codifies the Commission's prohibition of common ownership of co-located cable systems and broadcast television stations.[10] However, Section 613

---

[9] Marsh states that the Amarillo cable system has grown by 8300 subscribers since 1977 and now serves 46 percent of the homes in the franchise area. Also, Marsh claims that there have been no complaints about abuses due to the cross-ownership situation.

[10] *See* Section 613(a). Marsh believes that the cross-ownership restrictions of the Cable Act are unconstitutional. In spite of the statements we made in the *Memorandum Opinion and Order*, RM-3810, Docket 20423, in the January 11, 1985, supplement, Marsh argues that we have discretion to refrain from enforcing these provisions of the Cable Act. Further, in a second supplement filed April 1, 1985, Marsh contends that the decision by the U.S. Court of Appeals for the Ninth Circuit in *Perferred Communications, Inc. v. Los Angeles*, No. 84-5541 (9th Cir., March 1, 1985) indicates that our ban on cable/broadcast station cross-ownership is discriminatory and violates the First Amendment. As stated previously, we do not agree with Marsh's contention that Congress left the Commission discretion not to enforce the requirements of the Cable Act. Specifically, with respect to the decision in *Perferred Communications*, we find no basis for concluding that a stricter constitutional test is present than was involved in the broadcast/newspaper cross-ownership rules which were approved by the Su-

(f) of the Cable Act provides for grandfathering. This subsection reads:

> This section shall not apply to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.

9. Marsh argues that the term "interest" as used in this section includes the right of first refusal. Marsh cites the legislative history that states that the holding of an interest includes ". . . any enforceable agreement signed as of July 1, 1984, to obtain an interest . . ." in a cable system.[11] Marsh states that its right of first refusal was such an enforceable agreement. Therefore, the right of first refusal is grandfathered along with the 50 percent holding in TTA because the entire interest was held by Marsh on July 1, 1984. Further, in Marsh's view, the entire interest was not inconsistent with any valid statutory or regulatory restrictions at that time.

10. Finally, Marsh states that the Commission's concern with undue concentration of control of the video marketplace that underlay the denial of Marsh's 1977 petition has been shown to be insubstantial in the ensuing years. The petitioner cites our recognition in numerous recent proceedings that the likelihood of such concentration is extremely remote today. Marsh argues that the Commission should take these changed circumstances into account and reverse its 1978 decision. Marsh also notes that such a decision will not affect any of the other grandfathered cross-interests, as none of those situations is comparable.

---

preme Court in the face of constitutional challenge in *FCC v. National Citizens Committee for Broadcasting*, 435 U.S. 912 (1978).

[11] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) at 58.

11. We do not concur with Marsh Media's analysis that its right of first refusal constitutes a valid pre-1970 interest entitled to grandfathered status. Previously, we have concluded that a right of first refusal is a conditional stock option and not an interest within the meaning of the cross-ownership rules.[12] Contrary to Marsh's belief, this position was reiterated when the recent changes were made to our attribution rules. As a result of that proceeding, a note was added to Section 76.501 that states that ". . . non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected." [13] Accordingly, a right to acquire an interest is not a valid interest within the context of these rules until it is exercised. Therefore, Marsh's only pre-1970 interest in TTA is its original 25 percent of the partnership.

12. Furthermore, we have stated previously in cross-ownership cases that we are ". . . concerned about detriment to an individual private party only when public injury will also result." [14] Our cross-ownership prohibitions are premised on the belief that independent ownership results in a greater diversity of voices available to the public. Marsh only asserts that the denial of its petition to grandfather the 50 percent interest in TTA and the right of first refusal included in the original partnership agreement may result in private injury. Marsh has not demonstrated that any increase in diversity has resulted from its increased ownership interest in TTA since 1977. Also, Marsh has not shown that there is likely to be any public benefit from its exercise of the right of first refusal.

---

[12] *See*, for example, 67 FCC 2d 1516, 68 FCC 2d 712, *supra*, and *Cherry and Webb Broadcasting Company*, 19 FCC 667 (1955).

[13] *See* Section 76.501 note 2(f).

[14] *See* 68 FCC 2d 716 and *Sequoia Cablevision*, 66 FCC 2d 346 (1977).

13. We believe that Marsh's interpretation of the Cable Act is incorrect as it relates to its situation. The Cable Act grandfathers only those interests that were ". . . not inconsistent with any applicable Federal . . . regulation . . ." as of July 1, 1984. The Commission decided in 1978 that the 25 percent interest that Marsh acquired after we adopted our cross-ownership prohibitions and not entitled to grandfathered status under the interest or any other Marsh might acquire under its right of first refusal are inconsistent with our regulations and not entitled to grandfathered status under the Cable Act. The only reason Marsh has not divested this interest yet is that the Commission and Court agreed to hold this case in abeyance until more general issues were resolved, as they now have been.

14. We also note the distinction between this case and that of Western Communications, Inc. (WCI). WCI was recently granted a waiver to acquire an additional interest in its cross-owned cable system.[15] WCI, licensee of KRON-TV, San Francisco, was granted grandfathered status for its 80 percent interest in Concord TV Cable in the *Third Report and Order*. Subsequently, WCI requested a waiver to acquire the remaining 20 percent of the cable system. In granting the waiver, the Commission noted that WCI already had absolute control over the cable company's affairs and that acquisition of the remaining 20 percent interest would have no practical effect since there would be no change of control. In this regard, this situation differs significantly from that of Marsh Media. If Marsh Media's request is granted, a change of control will, in fact, take place. Marsh Media's legally held 25 percent of TTA now constitutes a minority interest. If Marsh were permitted to retain the 50 percent interest it presently holds, it would share control with its partner. Any further exercise of the right

---

[15] *See Memorandum Opinion and Order*, CSR-2591(x), adopted March 28, 1985.

of first refusal would allow Marsh to achieve majority control in TTA. We believe that this change of control would contravene the intent of our cross-ownership rules and would be contrary to our previous practice of granting waivers only in those cases where the cross-ownership restriction does not result in greater diversity of control or ownership.[16]

15. Finally, Marsh is correct that we believe that undue concentration of control in the video marketplace is now unlikely. However, we have only expressed this belief in the context of reevaluating our national and regional ownership policies.[17] The Commission continues to believe that our local ownership rules are essential to ensuring diversity of editorial voices in local media markets.[18] Further, Marsh has not demonstrated any specific changes in the Amarillo video marketplace that would justify a grant of its request. Therefore, we see no reason to exempt Marsh from our cross-ownership ban.

Conclusion

16. We conclude that Marsh Media's right of first refusal to acquire additional interests in Total Television of Amarillo is not a valid pre-1970 interest. Any interests in TTA acquired by Marsh after the Commission's adoption of the local cross-ownership restrictions are in violation of our rules. Therefore, only the 25 percent interest in TTA that Marsh held on July 1, 1970, may be grandfathered. Accordingly, we reconfirm our 1978 decision requiring Marsh Media to divest the 25 percent interest in TTA it acquired in 1977. We also deny

---

[16] *See Second Report and Order*, Docket 18397, 23 FCC 2d 816, 821 (1970), recon. den. 39 FCC 2d 377 (1973).

[17] *See*, for example, *Report and Order* in Docket 83-1009, 49 FR 31877 (August 8, 1984), *Memorandum Opinion and Order* in Docket 83-1009, 50 FR 46666 (February 1, 1985) and *Report and Order* in Docket 84-19, RM-4564, 49 FR 19670 (May 9, 1984).

Marsh's right to further exercise its right of first refusal for any additional interest in TTA. We direct Marsh to divest this interest within 180 days of the release of this memorandum.

17. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

18. Accordingly, IT IS ORDERED, that the request for reconsideration filed July 6, 1984, by Marsh Media, Ltd., IS DENIED.

19. IT IS FURTHER ORDERED, that Marsh Media bring itself into compliance with the Commission's cross-ownership rules consistent with paragraph 16 of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

APPENDIX C

FCC 84-527
35127

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RM-3810

Docket No. 20423

IN THE MATTER OF AMENDMENT OF THE COMMISSION'S RULES TO DELETE RESTRICTIONS ON CABLE TELEVISION BROADCAST TELEVISION CROSS-OWNERSHIP

DIVESTITURE REQUIREMENT OF SECTION 76.501 RELATIVE TO EGREGIOUS CABLE TELEVISION BROADCAST TELEVISION CROSS-OWNERSHIP IN EXISTENCE ON OR BEFORE JULY 1, 1970

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: December 4, 1984

By the Commission:

Introduction

1. Before the Commission is a petition for rule making filed by Marsh Media, Ltd. (Marsh), on November 24, 1980.[1] The petitioner seeks repeal of Section 76.501 of the Commission's Rules that restricts the ownership of cable television properties by television broadcasters.[2]

---

[1] Marsh is the owner of four television stations and eleven cable television systems.

[2] Section 76.501 prohibits cross-ownership between a cable television system and a national television network or a local broadcast

Marsh Media Petition

2. Section 76.501(a)(2) of the Commission's Rules prohibits cross-ownership between a cable television system and a broadcast station whose predicted Grade B contour overlaps the area served by the cable system. The rule was adopted because the Commission believed that it would further its "policy favoring diversity of control over local mass communications media."[3] In its petition, Marsh states that the rule should be repealed on the grounds that it goes beyond the Commission's jurisdiction, is an infringement on the First Amendment rights of broadcasters and that there is no practical evidence that this restriction serves the public interest.[4]

3. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act) was enacted. Section 613(a) of the Cable Act codifies the Commission's present prohibition of cable television system ownership by local television broadcasters. As a result, the Commission does not have the discretion to amend the rule. Accordingly, Marsh's petition for rule making is herein denied.

Divestiture of Egregious Cases

4. Section 76.501(b)(2) of the Commission's Rules grandfathers those cable/broadcast station cross-interests considered non-egregious (i.e., those cases where the broadcast station was not the only commercial broadcast

---

station. Marsh's petition focuses on the portion of the rule relating to cross-ownership by local stations. Network ownership of cable systems is the subject of Docket 82-434, 91 FCC 2d 76 (1982).

[3] *Second Report and Order*, Docket 18397, 23 FCC 820 (1970).

[4] Appendix A is a list of commenters. Public Notice (RM-3810), December 17, 1980. With regard to the cable/local broadcast cross-ownership issue, all five commenting parties reiterate arguments made by Marsh. Several commenters also discuss the rule banning network cable cross-ownership and CBS' request for waiver of that rule, which was pending at that time.

station providing principal community service to the cable community) that were in existence on or before July 1, 1970, the rule's effective date. It also defines the effective date to be applied to cause divestiture of those egregious cable/local television entities which existed prior to the adoption of the cross-ownership restrictions. However, this portion of the rule has been revisited in numerous Commission proceedings, but has never become effective.[5] The most recent action was the *Third Report and Order* in Docket 20423 where the Commission determined that complete divestiture was not necessarily the most appropriate means of achieving the public interest goals of enhanced competition in both the economic and idea marketplaces in all cases. The Commission decided to grandfather the 13 remaining non-egregious cable/broadcast cross-interests, a policy similar to one adopted for broadcast/newspaper cross-ownership.[6] With respect to the five remaining cases that ap-

---

[5] Originally, the rule required divestiture of all existing cross-interests by August 10, 1973. *Second Report and Order*, Docket 18397, 23 FCC 2d 816 (1970). This deadline was subsequently extended until August 10, 1975, and parties were allowed to file waiver petitions for grandfathered status. *Memorandum Opinion and Order*, Docket 18397, 39 FCC 2d 377 (1973). In light of the many waiver petitions filed, the Commission instituted another rule making proceeding. *Notice of Proposed Rule Making*, Docket 20423, 52 FCC 2d 161 (1975). In a *First Report and Order*, Docket 20423, 53 FCC 2d 1102 (1975), the "egregious" only divestiture standard was adopted, effective August 10, 1977. Following a court challenge and a Commission-requested remand, a *Further Notice of Proposed Rule Making* in Docket 20423 was issued to examine the cross-ownership issue again. 81 FCC 2d 150 (1980). The result of this inquiry was the *Third Report and Order*, in Docket 20423, 49 FR 23348.

[6] The Commission adopted a divestiture requirement only for those broadcast station/newspaper cross-interests which were egregious and grandfathered other cross-ownership situations. *Second Report and Order*, Docket 18110, 50 FCC 2d 1046 (1975). Among the cross-interests grandfathered was Marsh's KVII-TV, Amarillo, Texas and Total Television of Amarillo, the cable system in that city in which Marsh has a 50 percent interest.

pear to be egregious, we temporarily deferred action until consideration of this petition.[7] Given the fundamental issues involved and the potential adverse effects on the public and system and station owners, we believed that additional inquiry and analysis was needed before further action could be taken. Accordingly, the effective date for the divestiture requirement was suspended pending action on the Marsh Media petition and Docket 20423 was terminated.[8]

5. We believe it is necessary to require divestiture in those situations where there would otherwise be a virtual monopoly over local expression.[9] Furthermore, we believe that this action is consistent with the intent of Congress when it adopted the Cable Act. Section 613(f) of the Cable Act grandfathers interests held on July 1, 1984, if such interests were "not inconsistent with any ap-

---

[7] The five remaining cases that appear to be egregious cross-ownership situations are listed in Appendix B.

[8] Marsh filed for reconsideration in Docket 20423. In that petition Marsh states that the Commission erred in terminating the proceeding without addressing the broader question of the validity of the cable/broadcast television cross-ownership prohibition. That issue is essentially resolved here. The reconsideration petition also requests a clarification as to the extent that Marsh's cross-interest is grandfathered. That issue will be dealt with separately.

[9] The Commission has asserted the importance of the independence of viewpoints in local media markets throughout the many analyses of its ownership rules. Cable television systems are an integral part of these local media markets. They are potentially influential sources of information concerning local issues along with broadcast stations and newspapers. Cable systems are significantly increasing the supply of programming and information available to the public through the carriage of satellite delivered news and other nonentertainment programming. We continue to believe in this context divestiture that is essential to ensure the diversity of editorial voices in these local media markets. We also note that the Commission recently reiterated this belief that local ownership rules must be maintained when it examined the multiple ownership rules for broadcast stations. *Report and Order*, Docket 83-1009, 49 FR 31877 (1984) at paras. 10, 12, 31 and 32. This is the standard adopted in both Docket 18110 and Docket 20423.

plicable Federal or State law or regulation in effect on that date." The divestiture requirement for these egregious situations was part of the Commission's rules on July 1, 1984, although the effective date had been temporarily suspended. Accordingly, we will now terminate the stay of the divestiture rule and require divestiture of the five remaining cases that appear to be egregious cable/broadcast station cross-ownership situations within three years of adoption of this item (i.e., by November 8, 1987).[10]

Conclusion

6. The Commission's rule prohibiting common ownership of a cable television system and a co-located television station was codified in the Cable Communications Policy Act of 1984. As such, the Commission cannot repeal its rule. Therefore, Marsh Media's petition is effectively moot and must be denied. With respect to the existing cross-interests that appear to be egregious, divestiture is consistent with the Cable Act.

7. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

8. Accordingly, IT IS ORDERED that the request for rule making filed November 24, 1980, by Marsh Media, Ltd. IS DENIED.

9. ACCORDINGLY, IT IS ORDERED, that effective January 10, 1984, Part 76 of the Commission's Rules and Regulations is AMENDED as set forth in the attached Appendix C.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

---

[10] With the resolution of this matter which was deferred to this proceeding in Docket 20423, the Commission now amends Section 76.501 to reflect this divestiture date. Textual changes to Section 76.501 to effectuate this requirement appear in Appendix C.

APPENDIX A

List of Commenters

American Broadcasting Companies, Inc.
Joint comments of Bahia De San Francisco Television Company

Buford Television, Inc.
Forward Communications Corporation
Futura Communications Corporation
Guaranty Broadcasting Corporation
K-Six Television, Inc.
May Broadcasting Company
John H. Phipps Broadcasting Stations, Inc.
Plains Television Corporation
Retlaw Enterprises, Inc.
Service Broadcasters, Inc.
Shamrock Broadcasting Company, Inc.
Southern Television Corporation
Spanish International Communications Corporation
Studio Broadcasting System
Summit Radio Corporation
Welgel Broadcasting Co.
Ralph C. Wilson Communications, Inc.
Ziff-Davis Broadcasting Company

National Association of Broadcasters
General Electric Broadcasting Company, Inc.
National Broadcasting Company, Inc.

APPENDIX B

Egregious Cross-Owned Situations

Television Station	*Cable Television System*
KLOE-TV, Goodland, Kansas	Goodland, Kansas
WKYH-TV, Hazard, Kentucky	Hazard, Kentucky
KXGN-TV, Glendive, Montana	Glendive, Montana
KTEN, Ada, Oklahoma	Ada, Oklahoma
KSWO-TV, Lawton, Oklahoma	Lawton, Oklahoma

APPENDIX C

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 76.501 is amended by revising paragraph (b) (2) and by removing the note at the end of the section to read as follows:

§ 76.501 Cross-ownership.

* * * *

(b) * * *

(2) The provisions of paragraph (a) (2) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is, directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-4808 and 85-4319

MARSH MEDIA, LTD.,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of Decisions of the
Federal Communications Commission

Before THORNBERRY, POLITZ, and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Marsh Media, Ltd. for review of an order of the Federal Communications Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petitions for review of an order of the Federal Communications Commission are denied.

IT IS FURTHER ORDERED that petitioner pay to respondents the costs on appeal, to be taxed by the Clerk of this Court.

August 27, 1986

Issued as Mandate:

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4808
No. 85-4319

MARSH MEDIA, LTD. ("Marsh"),
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of Decisions of the
Federal Communications Commission

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 27, 1986, 5 Cir., 198-, —— F.2d ——)
(September 29, 1986)

Before THORNBERRY, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-775

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARSH MEDIA, LTD., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF AUTHORITIES

Page

Cases:

City of Los Angeles v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986) 8

FCC v. *League of Women Voters*, 468 U.S. 364 ..... 5, 6

FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) 4, 5, 6, 7, 8

First Report in Docket 15415, 1 F.C.C.2d 387 (1965) 2

FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) 8

Further Notice of Proposed Rulemaking in Docket 20423, 81 F.C.C.2d 150 (1980) 3

Marsh Media, Ltd., 67 F.C.C.2d 1516, reconsideration denied, 68 F.C.C.2d 712 (1978) 2

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 5

Notice of Inquiry in Docket 17371, 7 F.C.C.2d 853 (1967) 2, 8

Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 F.C.C.2d 417 (1968) 2, 8

Notice of Proposed Rulemaking in Docket 20423, 81 F.C.C.2d 150 (1980) 8

Page

Cases—Continued:

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 5

Report in Docket 84-282, 102 F.C.C.2d 143 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir.) 6

Second Report and Order in Docket 18397, 23 F.C.C.2d 816 (1970), reconsideration denied, 39 F.C.C. 377 (1973) 2

Second Report and Order in Docket 20423, 55 F.C.C.2d 540 (1975), reconsideration denied, 58 F.C.C.2d 596 (1976) 2

Third Report and Order in Docket 20423, 97 F.C.C.2d 65 (1984) 3

Constitution, statute and regulation:

U.S. Const. Amend. I 3, 4, 5, 6, 8

Cable Communications Policy Act of 1984, 47 U.S.C. (Supp. III) 531 *et seq.* :

§ 613(a), 47 U.S.C. (Supp. III) 533(a) 2, 4

§ 613(f), 47 U.S.C. (Supp. III) 533(f) 2

47 C.F.R. :

Section 76.501 ..... 2, 3, 4

Section 76.501(b)(1) 2

Page

Miscellaneous:

Charisma Broadcasting Corp., 50 Fed. Reg. 32634 (1985) 7

Elim Broadcasting, Inc., 50 Fed. Reg. 31030 (1985) 7

H.R. Rep. 98-934, 98th Cong., 2d Sess. (1984) 6

Kilgore Broadcasting, 50 Fed. Reg. 7827 (1985) 7

Notice of Inquiry in Docket 15415, 29 Fed. Reg. 5416 (1964) 2, 8

Vela Broadcasting Co., 50 Fed. Reg. 21938 (1985) 7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-775

MARSH MEDIA, LTD., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that statutory and regulatory prohibitions against cross-ownership of television broadcast stations and cable television systems are unconstitutional.

1. Petitioner is the owner of a television station in Amarillo, Texas. In 1965, petitioner and three partners obtained a franchise to establish a cable television system in Amarillo. Each partner received a 25% interest in the cable venture, as well as a right of first refusal should any of the other partners elect to sell its interest. Pet. App. 2a, 12a.

At the time that petitioner began its cable venture, neither Congress nor the Federal Communications Commission (FCC) had established rules prohibiting common ownership of television broadcast stations and cable systems in the same market area. After giving the matter extensive

consideration, however,[1] the FCC in 1970 prospectively prohibited the common ownership of television broadcast stations and cable television systems serving the same community. *Second Report and Order in Docket 18397*, 23 F.C.C.2d 816 (1970), reconsideration denied in part, 39 F.C.C. 377 (1973). See also *Second Report and Order in Docket 20423*, 55 F.C.C.2d 540 (1975), reconsideration denied, 58 F.C.C.2d 596 (1976) (codified at 47 C.F.R. 76.501). In 1984, Congress essentially codified the FCC's cross-ownership rule when it enacted Section 613(a) of the Cable Communications Policy Act of 1984 (CCPA), which makes it "unlawful for any person to be a cable operator if such person * * * owns or controls, the licensee of a television broadcast station" that serves "any portion of the community served by such operator's cable system." 47 U.S.C. (Supp. III) 533(a).

2. Petitioner's pre-1970 ownership of its 25% interest in the Amarillo cable system was protected by grandfather provisions in both the FCC's regulation (see 47 C.F.R. 76.501(b)(1)) and in Section 613(f) of the CCPA (47 U.S.C. (Supp. III) 533(f)). In 1977, however, petitioner exercised its right of first refusal to acquire a second 25% interest that was put on the market by one of its partners in the cable venture (Pet. App. 3a). Acting under 47 C.F.R. 76.501, the Commission concluded that this new interest was not grandfathered, and accordingly ordered its divestiture by petitioner. *Marsh Media, Ltd.*, 67 F.C.C.2d 1516, reconsideration denied, 68 F.C.C.2d 712 (1978). Petitioner's appeal

---

[1]See *Notice of Inquiry in Docket 15415*, 29 Fed. Reg. 5416 (1964); *First Report in Docket 15415*, 1 F.C.C.2d 387 (1965); *Notice of Inquiry in Docket 17371*, 7 F.C.C.2d 853 (1967); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417 (1968).

of this order was remanded to the Commission when the latter indicated that it was reassessing the cross-ownership restrictions. See Pet. App. 4a; *Further Notice of Proposed Rulemaking in Docket 20423*, 81 F.C.C.2d 150 (1980). At the same time, petitioner filed an independent petition requesting the FCC to repeal 47 C.F.R. 76.501, contending that the Commission had exceeded its statutory authority and had violated the First Amendment when it promulgated the rule.

Both of these proceedings were resolved against petitioner. The Commission first denied the petition seeking the repeal of 47 C.F.R. 76.501 (Pet. App. 21a-25a). The Commission explained that "it is necessary to require divestiture in those situations where there would otherwise be a virtual monopoly over local expression" (*id.* at 24a (footnote omitted)), adding that in such circumstances the cross-ownership prohibition "is essential to ensure the diversity of editorial voices in these local media markets" (*id.* at 24a n.9). The Commission also noted that its prohibitions on cross-ownership of broadcast and cable systems had been codified by Congress in the CCPA, a development that mooted petitioner's request for administrative repeal of the FCC's rule (*id.* at 25a).

The Commission also ultimately denied petitioner's request for reconsideration of the divestiture order in this case (Pet. App. 11a-20a). After generally reaffirming its cross-ownership and divestiture rules (see *Third Report and Order in Docket 20423*, 97 F.C.C.2d 65 (1984)), the Commission concluded that petitioner's exercise of a right of first refusal was not protected by the statutory or regulatory grandfather provisions (Pet. App. 17a-19a). The Commission also explained that it "continue[d] to believe that [its] local ownership rules are essential to ensuring diversity of

editorial voices in local media markets," adding that petitioner "has not demonstrated any specific changes in the Amarillo video marketplace that would justify a grant of its request" (*id.* at 19a (footnote omitted)).

3. The court of appeals rejected petitioner's challenges to both of the FCC orders (Pet. App. 1a-10a). The court first held that the FCC had authority to promulgate the cross-ownership rule (*id.* at 6a-7a) and that it properly had ordered divestiture in this case (*id.* at 7a-9a). The court then rejected petitioner's First Amendment challenge to the cross-ownership restrictions contained in Section 613(a) and 47 C.F.R. 76.501. The court explained that petitioner's constitutional arguments were foreclosed by *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which upheld a Commission rule "restricting cross-ownership of co-located daily newspapers and television stations" (Pet. App. 9a (footnote omitted)). The court added that it was unpersuaded by petitioner's attempt to distinguish the record here from the one in *National Citizens Committee*: the court noted that the cable cross-ownership rule had been considered in several rulemaking proceedings in which an "extensive record [had been] developed." The court accordingly concluded that, "[t]o the extent that the [cable cross-ownership] Rule is based on policy goals and educated 'guestimates' by the Commission, we find no meaningful difference from the 'judgmental or predictive' conclusions undergirding the divestiture order in *National Citizens Committee*." *Ibid.* (quoting 436 U.S. at 813).

4. Before this Court, petitioner makes two principal contentions: that technological developments have obviated the "spectrum scarcity" rationale underlying restrictions on the ownership of television broadcast stations (Pet. 11-16); and that the record before Congress and the Commission

did not support the necessity of the cross-ownership restrictions (Pet. 17-25). These arguments—which invite the Court to assess technological and factual developments that were considered unpersuasive by Congress and the Commission—are without merit and do not warrant further review.

a. This Court has noted that there are a finite number of broadcast channels, a number that generally "is far exceeded by the number of persons wishing to broadcast to the public." *National Citizens Committee,* 436 U.S. at 799. See generally *FCC* v. *League of Women Voters,* 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210-218 (1943). Recognizing that the Commission must adopt rules to govern the allocation of these frequencies among competing applicants, the Court in *National Citizens Committee* upheld against a First Amendment challenge an FCC rule—precisely parallelling the one at issue here—that prohibited common ownership of newspapers and broadcast stations serving the same community. The Court saw "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. Since cable television operators hardly have greater First Amendment rights than the publishers of newspapers, the holding in *National Citizens Committee* is dispositive here.

In seeking to escape from this holding, petitioner argues principally that technological developments—increases in the number of available channels, greater use of videocassette recorders, and the like (Pet. 14-15)—have undermined the factual validity of the "spectrum scarcity" rationale that has been held to justify the regulation of broadcasters. We agree, of course, that technological

advances have occurred in this area; the Commission itself has expressed the view that attempts to regulate the *content* of broadcast speech may no longer be justified by the scarcity of electronic media outlets. See *Report in Docket 84-282 (Fairness Report)*, 102 F.C.C.2d 143 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir.).[2] But this hardly supports the broad contention made by petitioner. To the contrary, the Commission's *Fairness Report* addressed only a particular regulation of broadcast content—the "fairness doctrine"—and did not reach rules, such as the one here, that are directed to the ownership structure of the broadcasting industry.

Indeed, in the proceedings below the Commission rejected petitioner's factual submissions as a basis for departing from the ownership rules, declaring its continued belief "that our local ownership rules are essential to ensuring diversity of editorial voices in local media markets" (Pet. App. 19a (footnote omitted)). And as recently as 1984, Congress reached the same conclusion, finding it advisable to codify the FCC's cross-ownership restriction in the CCPA so as "to prevent the development of local media monopolies." H.R. Rep. 98-934, 98th Cong., 2d Sess. 55 (1984). See *id.* at 27. So long as there are more applicants

---

[2] *In League of Women Voters*, the Court noted criticism of the spectrum scarcity rationale, but stated that it was "not prepared * * * to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 377 n.11. Plainly, neither the Commission nor Congress has provided such a signal as to the cross-ownership restrictions in this case.

than there are broadcast licenses that can be granted,[3] there is no reason to doubt the validity of this conclusion.

b. Petitioner's contention (Pet. 17-25) that the need for statutory and regulatory cross-ownership restrictions was not established by the record before Congress and the Commission also cannot be reconciled with *National Citizens Committee*. In that case, the Court refused to invalidate the Commission's newspaper/broadcast cross-ownership restrictions, even though the "rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media"; the Court found it sufficient that, "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 796.

The Court also explained in *National Citizens Committee* that the factual determinations involved in cross-ownership divestiture rules are "primarily of a judgmental or predictive nature" (436 U.S. at 813). "In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public

---

[3]Recent proceedings in which the Commission designated mutually exclusive television applicants for comparative hearings demonstrates that this still is the case. See, *e.g.*, *Charisma Broadcasting Corp.*, 50 Fed. Reg. 32634 (1985) (designating 16 mutually exclusive applicants for a comparative hearing); *Elim Broadcasting, Inc.*, 50 Fed. Reg. 31030 (1985) (21 mutually exclusive applicants); *Vela Broadcasting Co.*, 50 Fed. Reg. 21938 (1985) (13 mutually exclusive applicants); *Kilgore Broadcasting*, 50 Fed. Reg. 7827 (1985) (21 mutually exclusive applicants).

interest lies necessarily involves deductions based on the expert knowledge of the agency' " (*id.* at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)). The record supporting the cable/broadcast cross-ownership restrictions—which was compiled in four extensive rulemaking proceedings[4] and was endorsed by Congress in the CCPA—is thus more more than adequate.[5]

---

[4]See *Notice of Inquiry in Docket 15415*, 29 Fed. Reg. 5416 (1964); *Notice of Inquiry in Docket 17371*, 7 F.C.C.2d 853 (1967); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417 (1968); *Notice of Proposed Rulemaking in Docket 20423*, 81 F.C.C.2d 150 (1980).

[5]Petitioner's contention (Pet. 17-18) that this conclusion cannot be reconciled with *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), is without merit. In that case, the Court simply declined to reach the merits of a First Amendment challenge to a municipality's regulation of cable television in the absence of adequate information about the nature of cable operations. See *Preferred Communications*, slip op. 5, 6; *id.* at 1 (Blackmun, J., concurring). In contrast, the Commission adopted its rules after extensive rulemaking proceedings in which it received comment from interested parties, giving the Commission and Congress ample information to support the cross-ownership restrictions. Petitioner similarly is off the mark in contending that the cross-ownership restriction at issue here either "singles out a class of persons for different treatment" (Pet. 22) or regulates speech on the basis of content (Pet. 23). In fact, the statute and rule challenged by petitioner treat broadcasters "in essentially the same fashion as other owners of the major media of mass communications." *National Citizens Committee*, 436 U.S. at 801. And the prohibition here is based on the nature of petitioner's other media holdings, not on the content of its speech. See *id.* at 800-801.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DIANE S. KILLORY
General Counsel
Federal Communications Commission

JANUARY 1987